

**COMMANDER, NAVY REGION MID-ATLANTIC
GUIDE TO DOD FEDERAL CONSISTENCY
IN THE COMMONWEALTH OF VIRGINIA**

PREFACE

Passed by Congress in 1972, the Federal Coastal Zone Management Act (CZMA) created a national management program to comprehensively manage competing uses of and impacts to coastal uses and resources. The CZMA's Federal consistency provision (CZMA § 307) requires that Federal agency actions, inside or outside designated state coastal zones, that affect any coastal use or resource must be consistent with the Federally-approved enforceable policies of the state's coastal management program.

This publication has been prepared by Commander, Navy Region Mid-Atlantic as a guide to Department of Defense (DOD) installations and other Federal agencies located within the Commonwealth of Virginia. Designed for use as general reference, the purpose of this guide is to provide a brief overview of Federal Consistency and the components of the enforceable policies of the Commonwealth of Virginia's Coastal Resources Management Program. For more detailed information and to fully comply with the CZMA's requirements see CZMA § 307 (16 U.S.C. § 1456) and NOAA's Federal Consistency regulations at 15 C.F.R. Part 930.

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PART I: THE COASTAL ZONE MANAGEMENT ACT

Authority: 16 U.S.C. § 1451 *et seq.*

A. CZMA Overview

Declaring the national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations," Congress enacted the Coastal Zone Management Act ("CZMA") in 1972.¹ The stated purpose of the CZMA was to develop a national coastal management program ("NCMP") that comprehensively manages and balances competing uses of and impacts to any coastal use or resource.² The CZMA encourages states to take an active role in the management of, and control over, the coastal zone, including submerged lands and coastal waters within the territorial boundaries of the State. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.³

B. State Coastal Management Programs

Through a system of Federal grants and other incentives, the NCMP is implemented by federally approved voluntary state Coastal Management Programs ("CMPs").⁴ The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of [the CZMA], setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.⁵ These state management programs should include a variety of provisions, including protection of natural resources, the management of coastal development and the coordination and simplification of procedures in order to ensure expedited governmental decision-making for the management of coastal resources.⁶ Pursuant to authority delegated from the U.S. Secretary of Commerce, the National Oceanic and

¹ 16 U.S.C. §§ 1451 *et seq.*

² *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed. Reg. 77124 (Dec. 8, 2000). The Office of Ocean and Coastal Resource Management ("OCRM") administers the NCMP, which is part of the National Ocean Service, National Oceanic and Atmospheric Administration ("NOAA"), U.S. Department of Commerce.

³ *Cape May Greene, Inc. v. Charles S. Warren*, 698 F.2d 179, 187 (3rd Cir. 1983) *citing* Sen. Rep. No. 753, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4776. *See also* Commerce Committee, Coastal Zone Management Act, S. Rep. No. 753, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4786.

⁴ *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 592 (1986).

⁵ 16 U.S.C. § 1453(12).

⁶ 16 U.S.C. §§ 1452(2)(A), (B), (C), and (G).

Atmospheric Administration ("NOAA") implements the NCMP and decides whether to approve state CMPs.⁷

In addition to eligibility for annual operating funds, Federal approval of a state CMPs triggers the CZMA Section 307 Federal consistency requirement.⁸

PART II: FEDERAL CONSISTENCY

Authority: CZMA Section 307, 16 U.S.C. § 1456. NOAA Federal Consistency regulations at 15 C.F.R. part 930, as revised by 65 Fed. Reg. 77123 (December 8, 2000).

A. Federal Consistency Requirement

Federal Consistency is the CZMA requirement that:

Any Federal agency actions within or outside the coastal zone that affects any land or water use or natural resource of the state's coastal zone be consistent to the maximum extent practicable with the enforceable policies of the state's Federally approved coastal zone management program. 16 U.S.C. §§ 1456(c)(1) and (c)(2).

There are no categorical exemptions to or exclusions from the CZMA's Section 307 Federal Consistency requirement.

B. Definitions

For a complete list of applicable definitions consult CZMA § 304 (16 U.S.C. § 1453) and 15 C.F.R. Subpart B.

1. **Coastal Effects** - The term "effect on any coastal use or resource" means any reasonably foreseeable effect on any coastal use or resource resulting from Federal action. 15 C.F.R. § 930.11(g). Intended to be construed broadly, the term "affecting" includes direct effects (which are caused by the activity and occur at the same time and place), indirect effects (which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable) as well as cumulative and secondary effects. *Id.*; 136 Cong. Rec. H 8076 (Sep. 26, 1990). Effects are not just environmental effects, but include effects on coastal uses (see definition of coastal uses below). 15 C.F.R. § 930.11(g).

⁷ See 16 U.S.C. § 1455.

⁸ CZMA § 307; 16 U.S.C. § 1456.

2. **Coastal Resources** - Coastal resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc. See 15 C.F.R. § 930.11(b).
3. **Coastal Uses** - Coastal uses include such activities as public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects, etc. See 15 C.F.R. § 930.11(b).
4. **Coastal Zone** - The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents. 16 U.S.C. § 1453(1); 15 C.F.R. § 930.11(e).
5. **Development Project** - a Federal agency activity involving the planning, construction, modification, or removal of public works, facilities or other structure and includes the acquisition use or disposal of any coastal use or resource. See 15 C.F.R. § 930.31 (b).
6. **Enforceable Policies** - The term "enforceable policy" means state policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a state exerts control over private and public land and water uses and natural resources in the coastal zone. 16 U.S.C. § 1453(6a); 15 C.F.R. § 930.11(h).
7. **Federal Actions** - The term "Federal agency activity" means any functions performed by, or on behalf of, a Federal agency as to the exercise of its statutory requirements. 15 C.F.R. § 930.31(a). They include direct and indirect Federal agency

activities, Federal approval activities, and Federal financial assistance activities. 15 C.F.R. § 930.11(g).

Examples include: Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of Federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an outer continental shelf (OCS) oil and gas lease sale by the Minerals Management Service (MMS), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction.

8. **Fully Consistent** - Compliance with all applicable state program requirements (including permits and fees) but only for those state programs where there is a program coastal effect and a valid waiver of Federal sovereign immunity (CWA and CAA programs only). For those state programs where there is no valid Federal waiver of sovereign immunity (Dunes, Subaqueous Lands, Fisheries, Shoreline Sanitation Program, and Coastal Lands Management Programs), the proposed activity must otherwise meet all program requirements -- other than obtaining permits or payment of fees. In other words, if Federal sovereign immunity were waived, the proposed activity would qualify for VDEQ program approval or permit.
9. **Maximum Extent Practicable** - The term "maximum extent practicable" describes the requirement that Federal activities affecting the state's coastal zone be fully consistent with the enforceable policies of the state's coastal management program unless compliance is prohibited based upon the requirements of existing law applicable to the facility. 15 C.F.R. § 930.32(a)(1). Full consistency is required unless some unforeseen circumstances arise which present the Federal agency with a substantial obstacle that prevents complete consistency. 15 C.F.R. § 930.32(b).
10. **Negative Determination** - Federal agency finding of no coastal effects for the proposed activity. See "Coastal Effects."

PART III: VIRGINIA'S COASTAL RESOURCE MANAGEMENT PROGRAM**A. Introduction**

The Virginia Coastal Resources Management Program, also known as the Virginia Coastal Program (VCP), was established in 1986 as a network of existing agencies, each having responsibilities in implementing Virginia's coastal resources management laws. The Department of Environmental Quality (DEQ) serves as the lead agency for Virginia's networked coastal program and Federal consistency review.

Having an approved Coastal Program authorizes Virginia to require that Federal actions affecting its coastal zone uses and resources are consistent with the enforceable policies of the VCP.

Authority: Virginia Executive Order Number Thirteen (86), and continued by subsequent executive orders, the most recent being EO (98).

B. Virginia's Designated Coastal Management Area

The VCP was established to protect and manage an area known as the Virginia's "coastal zone" encompassing 83 Tidewater Virginia jurisdictions including 29 counties, 15 cities and 43 towns and all the waters therein, and out to the three-mile Territorial Sea boundary, including all of Virginia's Atlantic coast watershed with its vast barrier island lagoon system as well as parts of the Chesapeake Bay and Albemarle-Pamlico Sound watershed. Virginia Code §28.2-100.

A map of Virginia's coastal management area and a list of counties and cities located in therein are provided at Appendices A and B.

Practice hint: Federal Lands, the use of which is by law subject solely to the discretion or the discretion of or which is held in trust by the federal government, its officers or agents, are excluded from Virginia's coastal management area. However, activities on federal lands with any reasonably foreseeable coastal effects must be consistent with the enforceable policies of the VCP.

C. Enforceable Policies of Virginia's Coastal Resources Management Program

The nine federally approved enforceable programs of the Virginia Coastal Resources Management Program are:

1. Fisheries Management - Regulation of commercial and recreational fishing. This program stresses the conservation and enhancement of the finfish and shellfish resources and the promotion of commercial and recreational fisheries to maximize food production and recreational opportunities. The Virginia Marine Resources Commission (VMRC) and the Department of Virginia Department of Game and Inland Fisheries (VDGIF) administer this program.

The State Tributyltin (TBT) Regulatory Program is part of its Fisheries Management Program. The General Assembly amended the Virginia Pesticide and Application Act as it related to the possession, sale or use of marine antifouling paints containing TBT. The use of TBT in boat paint constitutes a serious threat to important marine species. The TBT program monitors boating activities and boat painting activities to ensure compliance with TBT regulations promulgated pursuant to the amendment. The VMRC, DGIF and Virginia Department of Agriculture Consumer Services (VDACS) share enforcement responsibilities.

Authority: Virginia Code §§ 29.1-100 to -570 and §§ 3.1-249.59 to §3.1-249.62). For a list of applicable VMRC regulations visit their website at <http://www.state.va.us/mrc/page4.htm>

Permit required: No. However, if there will be significant impacts to fisheries, conference with VDGIF and/or VMRC recommended.

2. Subaqueous Lands Management - Regulates all encroachments in, on and over state-owned subaqueous beds. This program establishes conditions for granting or denying permits to use the state-owned bottomlands based on considerations of potential effects on marine and fisheries resources, wetlands, adjacent or nearby properties, anticipated public and private benefits, and water quality standards established by the Department of Environmental Quality, Water Division. The Marine Resources Commission administers the program.

Authority: Subaqueous Lands Management Act, Virginia Code § 28.2-1200 *et seq.* and § 28.2-1300 *et seq.* For more information visit the VMRC homepage at <http://www.state.va.us/mrc>.

Permit required: No.

3. Wetlands Management - Regulates all encroachments into vegetated and non-vegetated tidal wetlands. The purpose of the wetlands management program is to preserve tidal wetlands, prevent their despoliation, and accommodate economic development in the manner consistent with wetlands preservation.

(1) The tidal wetlands program is administered by the Marine Resources Commission (Virginia Code §28.2-1301 to §28.2-1320).

(2) The Virginia Water Protection Permit program administered by DEQ includes protection of wetlands - both tidal and non-tidal (Virginia Code §62.1-44.15:5) and Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act.

Permit requirement: Yes. A Joint Permit Application (JPA) must be submitted to VMRC whenever there are impacts to wetlands. An electronic copy of the JPA can be found at: <http://www.nao.usace.army.mil> Click on the Site Map link and scroll down to find the JPA link.

4. Dunes Management - Regulates encroachments into coastal primary sand dunes. The program requires no permanent alternation of or construction upon, any coastal primary sand dune that would impair the natural functions of the dune, physically alter the contour of the dune, or destroy the vegetation of the dune. The Virginia Marine Resources Commission (VMRC) administers this program.

Authority: The Coastal Primary Sand Dune Protection Act, Virginia Code §28.2-1400 to §28.2-1420. See also 4 VAC 20-440-10 *et seq.*

Permit requirement: No.

5. Nonpoint Source Pollution Control - Regulates erosion and sedimentation from land disturbing activities. This program requires soil-disturbing projects to be designed to reduce soil erosion and to decrease inputs of chemical nutrients and

sediments to the Chesapeake Bay, its tributaries, and other rivers and waters of the Commonwealth. The Department of Conservation and Recreation (DCR) administers this program.

Authority: Virginia Erosion and Sediment Control Law, Virginia Code § 10.1-567 and the implementing Virginia Erosion and Sediment Control Regulations, 4 VAC 50-30-30 *et seq.*

Authority: Virginia Stormwater Management Law, Virginia Code § 10.1-603.5 and the implementing Virginia Stormwater Management Regulations, 4 VAC 3-20-210 *et seq.*

Permit requirement: No. However, federal agencies must comply with Virginia Erosion and Sediment Control Regulations.

6. Point Source Pollution Control - Regulates discharges into state waters through Virginia pollutant Discharge Elimination system (VPDES) and Virginia Pollutant Abatement Permits. The DEQ also administers Section 401 water quality certification under the Federal Clean Water Act, which includes non-tidal wetlands protection.

The point source program is administered by the State Water Control Board pursuant to Virginia Code §62.1-44.15. Point source pollution control is accomplished through the implementation of:

(1) The National Pollutant Discharge Elimination System (NPDES) permit program established pursuant to Section 402 of the Federal Clean Water Act and administered in Virginia as the VPDES permit program. 9 VAC 5-40-5600 *et seq.*

(2) The Virginia Water Protection Permit (VWPP) program administered by DEQ (Virginia Code §62.1-44.15:5) and Water quality Certification pursuant to Section 401 of the Federal Clean Water Act.

Permit required: Yes, unless exemptions apply.

7. Shoreline Sanitation - Regulates shoreline use of septic or other on-site domestic waste systems. The purpose of this program is to regulate the installation of septic tanks, set standards concerning soil types suitable for septic tanks, and specify minimum distances that tanks must be placed away from streams, rivers, and other waters of the Commonwealth. The Department of Health (VDOH) administers this program.

Authority: Virginia Code §32.1-164 through §32.1-165). See also VDOH Sewage Handling and Disposal Regulations, 12 VAC 610-20 *et seq.* For a copy of the regulations visit <http://www.vdh.state.va.us/onsite/regulations/SH&DR7-19.pdf>.

Permit required: No.

8. Air Pollution Control - Regulates emissions affecting air quality. The program implements the Federal Clean Air Act to provide a legally enforceable State Implementation Plan for the attainment and maintenance of the National Ambient Air Quality Standards. The State Air Pollution Control Board administers this program.

Authority: Virginia Air pollution Control Law, Virginia Code §10-1.1300 *et seq.* and its implementing Regulations for the Control and Abatement of Air Pollution, 9 VAC 5-10-10 *et seq.*

Permit required: Yes. Federal facilities must comply with CAA permitting and general conformity requirements. Normally this is complied with by preparing a Record of Non-Applicability (RONA).

9. Coastal Lands Management - Regulates activities in properly designated Chesapeake Bay Resource Management Areas and Resource Protection Areas within Virginia's coastal zone. This is a state-local cooperative program administered by the Chesapeake Bay Local Assistance Department and 84 localities in Tidewater, Virginia.

Authority: Chesapeake Bay Preservation Act, Virginia Code §§ 10.1-2100 through 10.1-2114 and the implementing Chesapeake Bay Preservation Area Designation and Management Regulations, 9 VAC 10-20-10 *et. seq.*

Permit required: This is not a permit program.

Practice hint: Per NOAA OCRM, local governments may not designate Chesapeake Bay Preservation Areas (Resource Management Areas, or Resource Protection Areas) on federally owned land.

D. Advisory Policies of Virginia's Coastal Resources Management Program

Although not required, Federal agencies are required to consider the following advisory policies of Virginia's Coastal Resources

Management Program. See 15 C.F.R. § 930.30(c). A description of Commonwealth's Advisory Policies is provided at Appendix C.

PART IV: BASIC FEDERAL AGENCY CONSISTENCY PROCEDURES**Step 1 - Agency Effects Test**

Federal development projects that occur in the designated state coastal zone (i.e., not on federal lands) are automatically assumed to have an effect on the coastal zone.

For federal projects that occur on Federal lands, the Federal agency must determine whether the proposed Federal agency activity may reasonably affect any natural resource, land use, or water use of the designated state coastal zone. 15 C.F.R. § 930.33(a). Effects can be direct, indirect, secondary, or cumulative. 15 C.F.R. § 930.11(g). Effects are not limited solely to environmental effects, but include effects on coastal uses. 15 C.F.R. § 930.11(g).

States are encouraged to list activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity requires consistency review. 15 C.F.R. § 930.34(b). To date, Virginia has not developed such a list.

If there are coastal effects, the Federal agency must conduct the activity in a manner that is either fully consistent, or consistent to the maximum extent practicable (as defined in 15 C.F.R. § 930.32), with the enforceable policies of the VCP. (See definitions of fully consistent, and consistent to the maximum extent practicable.)

Practice Hint: Federal agencies are encouraged to contact the state agencies administering the enforceable policies early in the activity planning process to ensure early State-Federal coordination and consultation. A list of Virginia VDEQ contacts is provided at Appendix D.

Step 2 - Negative Determinations

If the Federal agency determines that an activity is not reasonably likely to have coastal effects, the Federal agency may have to provide the VDEQ a Negative Determination at least 90 days prior to final approval. (15 C.F.R. § 930.35).

Federal agencies must provide the state with a Negative Determination only if the activity is:

Identified by a VDEQ on a list of activities expected to affect coastal uses or resources. 15 C.F.R. § 930.35(a)(1). To date, Virginia has not promulgated a list of such activities.

The same or similar to activities for which the Federal agency has prepared consistency determinations in the past (15 C.F.R. § 930.35(a)(2)); or

One which the Federal agency undertook a "thorough consistency assessment" and "developed initial findings on the coastal effects of the activity. 15 C.F.R. § 930.35(a)(3).

While the form of the Negative Determination may vary, it must include a detailed description of the proposed activity, the activity's location and the basis for the Federal agency's determination that the proposed activity will not reasonably affect a coastal use or resource. 15 C.F.R. § 930.35(b).

See Federal Agency Negative Determination Outline at Appendix E.

Step 3 - Exemption from VDEQ Review

If the Federal agency determines that coastal effects are reasonably foreseeable, the Federal agency should determine whether the proposed activity (either on a case-by-case basis or for a category of activities) is exempted from further VDEQ review pursuant to an existing *de minimis*, environmentally beneficial, General, Phased, national, or regional consistency determination or other similar Federal/state agreement(s). See 15 C.F.R. § 930.33(3) through (5) and § 930.36 (c) through (e).

Practice hint: There are currently no approved *de minimis*, environmentally beneficial, General, Phased, national, or regional consistency determinations or other similar Federal/state agreement(s) exempting Federal agency activities or development projects from state review.

Step 4 - Coastal Consistency Determinations

If the Federal agency determines that coastal effects are reasonably foreseeable and the proposed action is not exempt from further VDEQ review, the Federal agency must then submit a "Consistency Determination" to the VDEQ at least 90 days before final approval of the federal agency activity unless the federal agency and the VDEQ agree otherwise. 15 C.F.R. § 930.36.

Practice hint: As the lead agency for the Virginia Coastal Resources Management Program (VCP), the Virginia Department of Environmental Quality (DEQ), Office of Environmental Impact Review is responsible for coordinating the Commonwealth's review of Federal Consistency determinations.

While the form of the Consistency Determination may vary, it must include a detailed description of the proposed activity, its expected coastal effects, an evaluation of proposed activity in light of the applicable enforceable policies in Virginia's VCP and comprehensive data and information sufficient to support its conclusion that the activity is consistent with the enforceable policies of the applicable state CMP. 15 C.F.R. § 930.39.

Practice hint: Fully consistent or consistent to MEP means full program compliance only if there is a valid Federal statutory waiver of sovereign immunity. For example, Federal agencies must fully comply with all state CWA (Point and Non-Point Source Programs, Wetlands) and CAA (General Conformity, Title V) program requirements - including obtaining permits and payment of fees. On the contrary, Federal agencies are prohibited from complying with the remaining state coastal management program requirements (Dunes, Subaqueous Lands, Fisheries, Shoreline Sanitation Program, and Coastal Lands Management Programs.)

The amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected efforts of the activity on the coastal zone. 15 C.F.R. § 930.39(a).

In instances where a proposed Federal agency action is subject to the requirements of NEPA, DEQ encourages the Federal agency to include its consistency determination in the NEPA documentation (preferably a draft A or EIS) as a matter of administrative convenience as well as to provide sufficient environmental information to support the consistency determination project and avoid VDEQ review delays due to submission of insufficient information. However, a separate Coastal

Consistency Determination may be provided to DEQ in lieu of the NEPA document.

See Federal Agency Consistency Determination Outline at Appendix F.

Step 5 - Public Notice

The VDEQ ensures that consistency reviews comply with the public participation requirements of CZMA Section 306(d)(14), as amended, and 15 C.F.R. § 930.2, § 930.42 and § 930.61. DEQ publishes the Federal agency's consistency determination for public review. DEQ procedural options to notify the public of project under review include: joint Federal/state notices, publications in local newspapers, notices published in the Virginia Gazette, electronic notices published on DEQ's website and Federal agencies' websites and joint Federal/state public hearings. If there has been a previous public notice of the proposed action, VDEQ may not be required to provide an additional public participation review.

Step 6 - State Review Process

The states have up to 60 days to review both Federal agency coastal consistency determinations and negative determinations, and it reserves the right, when necessary, to request from the Federal agency an additional automatic 15-day extension to complete its review. 15 C.F.R. § 930.41(b); 930.35(c). VDEQ acts as a clearinghouse and distributes the Federal agency's consistency determination to all individual state agencies administering the coastal policies that were not previously contacted by the Federal agency, (i.e., through the permitting process).

The 60-day review period begins when the state receives the consistency determination and supporting information required by 15 C.F.R. § 930.39(a). 15 C.F.R. § 930.41(a). If VDEQ indicates the information is inadequate, DEQ attempts to obtain the additional information from the Federal agency within the initial 60-day review period. When requesting additional information, VDEQ must be specific when requesting additional information.

If the Federal agency is unable to provide the necessary information in a timely manner, DEQ may formally object to the consistency determination based on insufficient information (See 15 C.F.R. § 930.43(b)). A copy of each objection is sent to the Director of NOAA's OCRM.

When the program agencies have completed their reviews, DEQ prepares the Commonwealth's coordinated response to the Federal agency. DEQ

resolves any conflicts in reviewer's comments or seeks clarifications from reviewers before responding to the Federal agency. DEQ also requests time extensions when needed for program agencies to complete reviews.

Step 7 - VDEQ Concurrence

After reviewing the Federal agency consistency, VDEQ is required to inform the Federal agency of its concurrence or objection. 15 C.F.R. § 930.41(a).

If VDEQ concurs with the Federal agency consistency determination, then the Federal agency may immediately proceed with the activity. 15 C.F.R. § 930.41(a).

The Federal agency may presume VDEQ concurrence if VDEQ does not meet the regulatory review time frames (60 days absent extension request). 15 C.F.R. § 930.41(a). Federal agencies may not presume VDEQ concurrence if the state requests, within the 60-day period, an extension of review time. 15 C.F.R. § 930.41(b).

Absent VDEQ concurrence or presumption of concurrence, Federal agencies are prohibited from taking action sooner than 90 days from VDEQ receipt of the Federal agencies determination. 15 C.F.R. § 930.41(c).

Step 8 - VDEQ Objection

If VDEQ objects to the Federal agency determination, VDEQ must describe how the proposed activity is inconsistent with its enforceable policies and the specific enforceable policies (including citations). 15 C.F.R. §§ 930.43(a)(1) and (2).

VDEQ should also describe alternative measures (if they exist), which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the state coastal management program. 15 C.F.R. § 930.43(a)(3).

In the event of a dispute, VDEQ will attempt to resolve the differences between the state and the Federal agency within the remaining 90-day notice period. The Federal agency and the state should use the remaining portion of the 90-day notice period to attempt to resolve their differences. 15 C.F.R. § 930.43(a).

Step 9 - Dispute Resolution

At the end of the 90-day period, if resolution has not been reached, the Federal agency may consider postponing final Federal action until the problem is resolved or either party can request mediation by NOAA's Office of Ocean and Coastal Resource Management (OCRM) or the Secretary of Commerce (the Secretary's mediation is more formal). 15 C.F.R. § 930.44(d). See Secretarial Mediation provisions at 15 C.F.R. §§ 930.110 to 930.115.

Step 10 - Proceeding Over State Objection

At the end of the 90-day period the Federal agency may, notwithstanding state objection, proceed with the proposed activity only if the Federal agency clearly describes, in writing, to the state the specific legal impediments to full consistency (if required) and its decision to proceed over state objection before the project commences. 15 C.F.R. §§ 930.43(d) and (e).

Part V: MISCELLANEOUS FEDERAL CONSISTENCY PROVISIONS**A. Judicial Review**

While there is no private right of action against Federal agencies under the CZMA itself, judicial review of a Federal agency's activity is provided through the Federal Administrative Procedure Act. 15 C.F.R. § 930.44(d). See Secretarial Mediation provisions at 15 C.F.R. §§ 930.110 to 930.115.

B. Supplemental Coordination

Federal agencies are under an affirmative obligation to prepare supplemental consistency determinations for any proposed Federal agency activity affecting a coastal use or resource substantially different than that previously described in an earlier consistency determination determined by the state to be consistent with the enforceable policies of its coastal management program. 15 C.F.R. § 930.46.

C. State Processing Fees

State agencies cannot require Federal agencies to pay a fee to process the Federal agency's consistency determination unless payment of such fees is required by Federal law, other than the CZMA, or otherwise agreed to between the Federal agency and the state and allowed by the Comptroller General of the United States. 15 C.F.R. § 930.41(e).

D. State Permit Requirements

The CZMA does not require Federal agencies to obtain State permits. State agencies cannot require Federal agencies obtain state permits to process the Federal agency's consistency determination unless Federal law, other than the CZMA, requires and authorizes Federal agency compliance with state permitting requirements. 15 C.F.R. § 930.40(e).

A Federal agency activities flow chart is provided at Appendix G.

Submit comments or recommended changes to:

Regional Environmental Coordinator (Code 00R)
Department of the Navy
Commander, Navy Region, Mid-Atlantic
6506 Hampton BLVD.
Norfolk, VA 23508-1273